A **MAYBAN TRUSTEES BHD**

**v.**

**BOUSTEAD HOLDINGS BHD**

B HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[CIVIL SUIT NO: D8-22-1463-2007]
24 NOVEMBER 2008

C ***CONTRACT:*** *Specific performance - Application for - Rules of the High Court 1980, O. 81 - Exercising option in contract - Whether party required to communicate with other party - Whether defendant's notice to redeem bonds overrode the subsequent notice to convert given by plaintiff - Rule of 'first in time first in right' - Whether application dismissed*

D ***CIVIL PROCEDURE:*** *Pleadings - Striking out - Application for - Rules of the High Court 1980, O. 18 r. 19(1)(b) & (d) - Whether plaintiff's suit scandalous, vexatious and an abuse of process of court*

There were two applications herein. Enclosure 13 was an
E application by the defendant to strike out the plaintiff's pleading on the ground of O. 18 r. 19(1)(b) and (d) of the Rules of the High Court 1980. Enclosure 15 was an application by the plaintiff for specific performance on a summary basis pursuant to O. 81 of the Rules of the High Court 1980. The plaintiff's claim in this
F case arose from a trust deed in respect of a seven year redeemable convertible bonds issued by the defendant to the plaintiff. The manner by which the defendant could exercise its rights to redeem the bonds under an optional redemption before the date of maturity after three years was to give a redemption
G notice to the plaintiff not less than 30 days prior to the redemption date (cl. 4.2) of the trust deed. The defendant issued a redemption notice dated 1 October 2007; the redemption would be effective on 1 November 2007. Prior to 1 October 2007, the plaintiff and the defendant had convened a meeting and agreed
H between them that the redemption sum should be RM47,740 for all the bonds subscribed by the plaintiff. Following the notice, the defendant proceeded to pay the entire redemption sum to the appointed paying agent, Aseambankers Malaysia Berhad on 30 October 2007. On 1 November 2007, the paying agent
I attempted to pay the said sum to the plaintiff. The plaintiff refused and asked the paying agent to return them to the defendant. On

5 November 2007, the defendant issued a certificate of cancellation of the bonds thereby rendering them ineffective. The plaintiff argued that under cl. 5A the plaintiff had the right at any time to convert the bonds into fully paid up shares at the conversion price as defined in the definitions clause. A notice to convert all the bonds was issued by the plaintiff and received by the registrar of the defendant company on 16 October 2007. The issue in both the applications was whether the redemption or the conversion came first, the result of which would determine the respective rights of the parties.

**Held (allowing defendants encl. 13 and dismissing plaintiff's encl. 15):**

**(1)** To exercise an option in a contract, a party is required to communicate with the other party that he intends to exercise the option and that can only be done by a notice to that party indicating his wish to exercise the option. The notice given to the plaintiff by the defendant dated 1 October 2007 informing the plaintiff that it intends to redeem the bonds pursuant to cl. 4.2 of the trust deed constituted a perfectly valid exercise of its option to redeem. That notice was given within the window period before the maturity date of the bonds some 15 days before the plaintiff gave its own notice on 16 October 2007 to convert the bonds pursuant to cl. 5A of the same trust deed. The effect of the defendant's notice was to reserve for itself the right to redeem the bonds within the window period. The defendant was 'first' on the notice and the notice overrode the subsequent notice to convert given by the plaintiff. The defendant was therefore the first in time and hence the first in right. (paras 17, 18, 19 & 20)

**Legislation referred to:**
Rules of the High Court 1980, O. 18 r. 19(1)(b), (d), O. 81

*For the plaintiff - Robert Lazar (Lai Wai Fong & Caryn Yu with him); M/s Shearn Delamore & Co*
*For the defendant - Fahri Azzat (Cik Aishah with him); M/s Azzat & Izzat*

*Reported by Suhainah Wahiduddin*

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## JUDGMENT

**Kang Hwee Gee J:**

**This Is My Oral Judgment: (*ex-tempore*)**

B **[1]** There are two applications encl. 13 and encl. 15.

**[2]** Enclosure 13 is an application by the defendant to strike out the plaintiff's pleading on the ground of O. 18 r. 19(1)(b) & (d) of the Rules of the High Court 1980 that is to say scandalous,
C vexatious and an abuse of the process of the court.

**[3]** Enclosure 15 is an application by the plaintiff for specific performance on a summary basis pursuant to O. 81 of the Rules of the High Court 1980.

D **[4]** The plaintiff's claim in this case arose from a trust deed in respect of a seven year redeemable convertible bonds issued by the defendant to the plaintiff, the plaintiff having taken up RM40 million worth of bonds. The bonds were taken up by Malaysia National Insurance Berhad (MNIB) and the rights are to be
E enforced by the trustee, Mayban Trustees Berhad under the terms of the trust deed.

**[5]** The bonds can be redeemed in one of two ways:

F (i) on maturity upon reaching a period of seven years on 19 August 2011;

(ii) optional redemption before the date of maturity after three years.

G **[6]** The manner by which the defendant can exercise its rights to redeem the bonds under (ii) is to give a redemption notice to the plaintiff not less than 30 days prior to the Redemption Date (cl. 4.2 of the trust deed). Under the Definitions Clause 1.1 the Redemption Date is the date fixed for redemption in the notice
H given pursuant to cl. 4.2.

**[7]** The defendant issued a redemption notice dated 1 October 2007 and stipulating the redemption date as 1 November 2007. That being the case the redemption will be effective on
I 1 November 2007. Prior to 1 October 2007 the plaintiff and the defendant convened a meeting and agreed between them that the redemption sum should be RM47,740,000 for all the bonds

subscribed by the plaintiff. The redemption notice was duly received by the plaintiff with the endorsement on the notice itself with the words "receipt acknowledged and agreed". A

**[8]** Following the notice, the defendant proceeded to pay the entire redemption sum to the appointed paying agent, Aseambankers Malaysia Berhad on 30 October 2007. On 1 November 2007 the paying agent attempted to pay the said sum to the plaintiff but this was refused and the plaintiff asked the paying agent to return them to the defendant. On 5 November 2007 the defendant issued a certificate of cancellation of the bonds thereby rendering them ineffective. B C

**[9]** Under cl. 5A the plaintiff has the right at any time to convert the bonds into fully paid up shares at the conversion price as defined in the Definitions Clause as RM1.95 per share. The conversion date is defined under the same Definitions Clause 1.1 as the date on which the conversion notice is received by the registrar of the defendant company, Boustead Management Services Sdn Bhd. D

**[10]** A notice to convert all the bonds was issued by the plaintiff and received by the registrar on 16 October 2007. E

**[11]** The issue in both the applications is whether the redemption or the conversion comes first, the result of which would determine the respective rights of the parties. F

**[12] Submission By Counsel For The Plaintiff: (***Verbatim***)**

1. The act of conversion took place on 16 October 2007. On that day the bonds had not been redeemed as the redemption date was fixed for 1 November 2007. The plaintiff can convert the bonds into shares before the defendant redeems them. The giving of the redemption notice by the defendant does not suspend the right to convert. G

2. The redemption clause stipulates that the defendant shall give to the bondholder a redemption notice of not less than 30 days prior to the redemption date (cl. 4.2 (b)) and redemption only takes place on the redemption date. The plaintiff exercised its conversion at the time after the redemption notice but before the redemption date which was 1 November 2007. H I

3. There is no extra period of 30 days for the conversion exercise unlike the redemption exercise, the redemption is only effective on the date of notice plus 30 days. The purpose of this period is to provide the window of opportunity to the bondholder to decide whether to convert or to allow redemption to take place and he would normally decide based on market sentiment.

**[13] Submission By Counsel For The Defendant: (*Verbatim*)**

1. There is no ground to grant specific performance as the bonds had been redeemed and cancelled.

2. A reasonable interpretation of the trust deed would show that only one right either to redeem or convert can be exercised at any one time. Once the plaintiff decides to redeem the plaintiff's right to convert is suspended or extinguished. There is no such right for the plaintiff to convert notwithstanding the effective date of redemption is 30 days after the notice.

3. The doctrine of estoppel operates in this case against the plaintiff's right to convert based on the conduct of the plaintiff. The defendant would refer to the meeting between the plaintiff and the defendant prior to the issuance of the redemption notice to agree on the redemption sum. The plaintiff stated the purpose of the meeting in para 21.3 of plaintiff's 5th affidavit as follows:

> 21.3 In the circumstances, it was necessary for MNIB and the Defendant to ascertain and agree on the 'accreted value' and consequently, the Optional Redemption Price. Since the documentation does not provide a formula for calculating the quantum, it was necessary for me to then discuss with the Defendant's representative and calculate and to arrive at what would be a mutually acceptable Optional Redemption Price. That was all that was done. Certainly there was no, waiver of the right of MNIB to convert the RC Bonds.

Now see p. 114 of encl. 13 exh. "ED2" – the redemption notice served by the defendant to the plaintiff in exercise of its right to redeem following the meeting. On receipt of the redemption notice the plaintiff not only acknowledged the receipt of the notice but agreed to the contents as well. The person who acknowledged receipt of this notice Puan Siti

Nita Zuhra Mohd Nazri was the same person who went to the meeting to fix the redemption price and she ought to have known the nature of the notice to redeem, that she acknowledged.

4. The period of 30 days notice for the redemption can equally be attributed to the time required for the issuer to make whatever arrangements necessary to redeem the bonds and to prepare for payment.

**[14] Reply By Mr. Robert Lazar For The Plaintiff**:

1. The act of the defendant in redeeming the Redeemable Convertible Bonds is an unilateral act on the part of the defendant which the plaintiff does not accept and further the purported act of redemption was made on 1 November 2007 after the plaintiff had exercised its right of conversion on 16 October 2007. On the contrary there was nothing to redeem as the bonds had already been converted by the plaintiff.

2. The conduct of the parties in agreeing to the quantum of the optional redemption price does not mean that the plaintiff gave up the rights to convert. The rights of the respective parties would have to be decided within the four corners.

**Findings And Decision**

**[15]** As the plaintiff has the right to convert and the defendant the right to redeem, the dispute can be quite easily resolved by applying the rule of priority that governs the orderly conduct of our daily lives – a *fortiori* in commercial contract involving large sums of money where decisions need to be made with speed and certainty.

**[16]** The rule is quite well established: first in time first in right.

**[17]** To exercise an option in a contract a party is required to communicate with the other party that he intends to exercise the option and that can only be done by a notice to that party indicating his wish to exercise the option. The notice given to the plaintiff by the defendant dated 1 October 2007 informing the plaintiff that it intends to redeem the bonds pursuant to cl. 4.2 of the trust deed constitutes a perfectly valid exercise of its option to redeem.

**[18]** That notice was given within the window period before the maturity date of the bonds some 15 days before the plaintiff gave its own notice on 16 October 2007 to convert the bonds pursuant to cl. 5A of the same trust deed.

**[19]** The effect of the defendant's notice is to reserve for itself the right to redeem the bonds within the window period that is to say, by cl. 1 definition of Optional Redemption Period:

> ... at any time commencing and including the third (3rd) anniversary of the Issue Date until 4.00 p.m. on the Business Days prior to the Maturity Date;

**[20]** The defendant was "first" on the notice and the notice overrides the subsequent notice to convert given by the plaintiff. The defendant was therefore the first in time and hence the first in right.

**[21]** The plaintiff's application (encl. 15) is dismissed.

**[22]** Enclosure 13 is allowed.

**[23]** The defendant shall be entitled to only one cost to be taxed for both the applications.